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In the Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER AND JUNE NOYES, ET AL.,
PETITIONERS

v.

CLYDE E. ALLEN, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether a Minnesota statute providing a state income tax deduction for tuition payments to both public and private elementary and secondary schools, as part of an overall scheme of deductions for a broad array of educational expenses, violates the Establishment Clause of the First Amendment.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a state statute providing a deduction for tuition payments to public and private elementary and secondary schools as part of a system of various types of state support for education. The Administration, as part of its overall program to improve the quality of education, supports federal legislation to provide tax relief for parents who choose nonpublic schools for their children. See Letter to the Speaker of the House and the President of the Senate Transmitting Proposed Legislation, 18 Weekly Comp. Pres. Doc. 828 (June 22, 1982). Such relief is the best means of "promot[ing] diversity in education and the freedom of individuals to take advantage of it, and to nurture the pluralism in American society which this diversity fosters" (*ibid.*). See also *Tuition Tax Credits: Hearings on S. 550 Before the Subcomm. on Taxation*

and Debt Management of the Senate Comm. on Finance, 97th Cong., 2d Sess., Pt. 2, 6 (1982) (statement of Terrell H. Bell). Tax relief is also important because the cost of both public and private education has risen dramatically in recent years. If nonpublic schools were no longer an available alternative, the resulting increase in public school attendance would impose significant new burdens on state and local taxpayers, and threaten the quality of education nationwide.

Since the Minnesota statute is similar to federal legislation proposed in the 97th Congress, and likely to be reintroduced in the 98th Congress, the United States has a strong interest in supporting its constitutionality.[1]

STATEMENT

1. Minn. Stat. Ann. § 290.09 (22) (West & Cum. Supp. 1982) authorizes a state income tax deduction for amounts paid for tuition, textbook, and transportation expenses incurred on behalf of children attending private or public elementary or secondary schools. Taxpayers may deduct only amounts actually spent, subject to certain maximums.[2] Deductible expenses must be incurred at schools that do not discriminate on the basis of race and that enable a Minnesota resident to fulfill

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[1] The United States filed amicus curiae briefs in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Sloan* v. *Lemon*, 413 U.S. 825 (1973), at a time when earlier tuition tax relief bills were pending in Congress.

[2] The deduction is limited to actual expenditures up to $500 per dependent in kindergarten through sixth grade, and $700 per dependent in the seventh through twelfth grades.

state compulsory attendance laws.[3] The statute has been in existence largely unchanged since 1955.[4]

2. Petitioners, two Minnesota taxpayers, filed this action in a representative capacity against the Minnesota Commissioner of Revenue in the United States District Court for the District of Minnesota, seeking injunctive relief against enforcement of the statute.[5] They claimed that Minn. Stat. Ann. § 290.09

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[3] The district court found deductible tuition expenses to include (Pet. App. A-62 to A-64):

1. tuition in the ordinary sense;
2. tuition charged to students who attend public schools outside the districts where they reside;
3. certain summer school tuition;
4. tuition charged by a school for private tutoring services for slow learners;
5. tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes;
6. tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school;
7. Montessori School tuition for grades K through 12;
8. tuition for driver education when it is part of the curriculum.

[4] In 1976, the statute was amended to increase the maximum deductible amounts from $200 to $500 and $700 and to add the cost of textbooks as deductible expenses. 1976 Minn. Laws 93. In 1978, an amendment excluded deductions for certain extracurricular activities. 1978 Minn. Laws 1022.

In 1971, Minnesota enacted a statute that provided an income tax credit to parents who paid tuition and textbook expenses for their children attending nonpublic schools, and who did not claim a deduction under Minn. Stat. Ann. § 290.09 (22) (West Cum. Supp. 1982). 1971 Minn. Laws 1971. The tax credit provision was held unconstitutional on Establishment Clause grounds by the Supreme Court of Minnesota. *Minnesota Civil Liberties Union* v. *State*, 302 Minn. 216, 224 N.W.2d 344 (1974).

[5] Petitioners were joined as plaintiffs by three other individuals, whose claims were dismissed by the district court as res

(22) (West Cum. Supp. 1982) violates the Establishment Clause of the First Amendment. Two groups of taxpayers with children in nonpublic schools (both sectarian and nonsectarian) intervened as defendants. The district court held that the deduction has a secular purpose and effect (Pet. App. A-69 to A-78) and presents minimal danger of entangling the state in religious affairs (*id.* at A-78 to A-80). It accordingly granted the defendants' motion for summary judgment.

3. The court of appeals affirmed (Pet. App. A-1 to A-55). Applying the well-established test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court "found no indicia of an invalid nonsecular purpose" (Pet. App. A-16). The court then turned to "the more difficult issue of whether the tuition deduction has the primary effect of advancing religion" (*id.* at A-36 to A-37). It concluded that Minnesota's deduction is different in significant respects from the form of aid held unconstitutional in *Committee For Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) ("*Nyquist*").[6] The court noted that Minnesota's deduction is available to all parents, not just private school parents (Pet. App. A-44 to A-46). Parents of children in private nonsectarian schools constituted some 14% to 18% of the taxpayers qualifying for the deduction, and parents of children in public schools paid more than $2

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judicata (Pet. App. A-57 to A-58). The three dismissed plaintiffs were found to have had an interest in an earlier (nonrepresentative) taxpayer action challenging the same law. *Minnesota Civil Liberties Union* v. *Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). In that case a three-judge court upheld the law against an Establishment Clause challenge.

[6] In *Nyquist*, this Court struck down a New York statute that offered a subsidy to low-income parents who sent their children to private schools, including sectarian schools, and a parallel tax credit in similar amounts for families with incomes between $5,000 and $25,000. See 413 U.S. at 764-766 & nn.18, 19.

million in tuition expenses in 1978-1979 (*id.* at A-45 to A-46). Moreover, unlike a "arbitrary" allowance or, in some cases, direct payment of the sort provided in *Nyquist*, the Minnesota tuition deduction operates more like the tax deduction afforded by federal law for charitable contributions (*id.* at A-46 to A-48). Thus, the court held that the Minnesota statute is similar to the laws upheld in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Everson* v. *Board of Education*, 330 U.S. 1 (1947), which provided textbooks and transportation to all school children, and to the tax exemption upheld in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), which extended benefits to a broad class of sectarian and nonsectarian institutions (Pet. App. A-40 to A-42).[7]

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[7] In *Walz*, a long-standing law providing an exemption from real estate taxes for property used for religious, educational, or charitable purposes was found not to violate the Establishment Clause.

The court of appeals also upheld provisions in the Minnesota law that allow deductions for transportation (see Pet. App. A-6 to A-7 n.3) and textbooks (*id.* at A-7 & n.4). Regarding the former, the court said that, given the approval of direct state payment for transportation in *Everson* v. *Board of Education*, *supra*, a deduction is a fortiori permissible (Pet. App. A-30 to A-31). For the same reason, the court concluded that a deduction for textbooks was authorized by *Board of Education* v. *Allen*, *supra* (Pet. App. A-31 to A-32). The court found slightly more difficult the statutory allowance of a deduction for instructional materials, which this Court has held cannot be loaned by the state to private schools either directly (*Meek* v. *Pittenger*, 421 U.S. 349, 362-366 (1975)) or through parents (*Wolman* v. *Walter*, 433 U.S. 229, 248-251 (1977)). It concluded, though, that any benefit to religion in this case was considerably more indirect, since what was at stake was a tax deduction for parents' purchases of nonreligious materials for use by their children at school (Pet. App. A-32 to A-35). The Question Presented in the petition does not expressly include a challenge to these portions of the court's opinion.

SUMMARY OF ARGUMENT

Minnesota has long provided a state income tax deduction for a broad array of educational expenses as part of an extensive system of state and local support for education. Viewed in this context, such a legislative scheme is consistent with the principle of neutrality that governs this Court's Establishment Clause jurisprudence. A legislative determination that money spent for such socially beneficial purposes should not count toward a family's tax liability is clearly permissible, and consistent with deductions provided for other types of socially useful expenditures. Notwithstanding clearly legitimate secular bases for legislation, however, a state's flexibility is necessarily circumscribed by the constitutional prohibition against the establishment of religion.

In assessing whether an otherwise neutral statute violates the Establishment Clause, this Court has considered whether the statute has a secular purpose; whether its primary effect is to advance religion; and whether it fosters an excessive entanglement of government with religion (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613). That the Minnesota statute has a secular purpose cannot be seriously challenged. *Nyquist*, *supra*, 413 U.S. at 773.

The Minnesota statute also does not have a primary effect of advancing religion. Unlike the New York statute invalidated in *Nyquist*, the tax benefit here is not in the form of, or a substitute for, a direct subsidy or reward for religious conduct. While it is true that a large portion of the tax benefits from the statute may flow to families with children in sectarian schools, percentages alone do not determine whether a law's primary effect is to advance religion. Also unlike *Nyquist*, the Minnesota law provides tax benefits to all parents, whether their children attend public or private school, for a broad array of educational expenses.

Finally, a tax deduction for parents with tuition expenses does not excessively entangle the government with religion.

ARGUMENT

MINNESOTA'S TUITION TAX DEDUCTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The task of this Court in accommodating "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause" is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act." *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion). Clearly, the decisions of this Court "do not call for total separation between church and state; total separation is not possible * * *."[8] Thus, the separation between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614.

Application of the neutrality principle in the area of state assistance to nonpublic schools has been particularly difficult, resulting in "lines that often must seem arbitrary." *Wolman* v. *Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part). In *Nyquist* this Court said that the state must "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." 413 U.S. at 788. The Minnesota deduction does not "advance" religion. It simply recognizes the costs borne by taxpayers who elect to provide their children what the basic public school system does not offer free of charge, and at-

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[8] *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-746 (1976); *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669.

tempts to soften the impact of those costs. It falls well within the principle that "there is room for play in the joints productive of a benevolent neutrality * * *." *Walz* v. *Tax Commission, supra*, 397 U.S. at 669.

The Establishment Clause has been interpreted to permit many laws that provide indirect benefits to sectarian institutions,[9] but certain kinds of assistance are impermissible.[10] In distinguishing between them this Court has asked whether the statute has a secular purpose, whether its primary effect is to advance (or inhibit) religion, and whether it fosters an excessive government entanglement with religion.[11] But these "tests must not be viewed as setting the precise limits to the necessary constitutional inquiry[; they] serve only as guidelines * * *."[12]

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[9] See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981); *Wolman* v. *Walter*, *supra*; *Roemer* v. *Board of Public Works*, *supra*; *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, *supra*; *Walz* v. *Tax Commission*, *supra*; *Board of Education* v. *Allen*, *supra*; *Everson* v. *Board of Education*, *supra*.

[10] See, *e.g.*, *Meek* v. *Pittenger*, *supra*; *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*.

[11] *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613; see also *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 7. Some cases have also considered whether the challenged law creates the potential for political conflict along religious lines. See *Wolman* v. *Walter*, *supra*, 433 U.S. at 243 n.11; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 372; *Nyquist*, *supra*, 413 U.S. at 794; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622-623.

[12] *Meek* v. *Pittenger*, *supra*, 421 U.S. at 359. See *Nyquist*, *supra*, 413 U.S. at 773 n.31, quoting *Tilton* v. *Richardson*, *supra*, 403 U.S. at 677-678 ("there is no single constitutional caliper that can be used to measure the precise degree" to which any of the Establishment Clause tests is applicable to a particular legislative enactment); *Wheeler* v. *Barrera*, 417 U.S. 402, 426 (1974).

A. The Minnesota Statute Has A Secular Purpose

It is by now well-established that the states have a legitimate secular interest in providing assistance to nonpublic schools.[13] Private schools, including religiously affiliated institutions, provide an education to state residents who would otherwise be entitled to attend public schools at local taxpayers' expense. *Hunt* v. *McNair*, 413 U.S. 734, 741-742 (1973). The states are legitimately concerned that their public school systems could become overburdened if substantial numbers of private school students were forced to enroll in public schools. *Nyquist*, *supra*, 413 U.S. at 773. Moreover, the welfare of all state residents is enhanced by state programs that endeavor to provide for all school children, including those attending nonpublic schools, "a fertile educational environment," *Wolman* v. *Walter*, *supra*, 433 U.S. at 236, and an "ample opportunity to develop to the fullest their intellectual capacities." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 352 n.2. In addition, this Court has recognized the "propriety, and fully secular content," of a state's interest "in promoting pluralism and diversity among its public and nonpublic schools." *Nyquist*, *supra*, 413 U.S. at 773. See also *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 754 (state statute "supporting private higher education generally, as an economic alternative to a wholly public system," has a secular purpose).

In *Nyquist* this Court was presented with one of numerous attempts by New York to provide direct benefits to parochial schools. See 124 Cong. Rec. 8708 (1978) (testimony of Professor Scalia). The Court nonetheless

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[13] See *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 754; *Wolman* v. *Walter*, *supra*, 433 U.S. at 236; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 363; *Hunt* v. *McNair*, *supra*, 413 U.S. at 741-742; *Nyquist*, *supra*, 413 U.S. at 773.

recognized that a state statute aiding nonpublic schools may have a secular purpose even if it has an impermissible "primary effect" of aiding religion. 413 U.S. at 773-774. See also *Meek* v. *Pittenger*, *supra*, 421 U.S. at 363. The court of appeals thus correctly rejected petitioners' argument that Minn. Stat. § 290.09(22) must necessarily have a nonsecular purpose if its effect is to aid families with children attending religious schools (see Pet. App. A-14). No other evidence of a constitutionally impermissible purpose has been adduced (see *id.* at A-69 to A-70).[14] Minnesota's statute reflects the State's intent to exempt from taxation that portion of all parents' income (below the deduction ceiling) devoted to the education of their children. As the court of appeals correctly recognized (*id.* at A-16):

> The manifest purpose of the * * * statute is to provide all taxpayers a benefit which will operate to enhance the quality of education in both public and private schools.

B. The Primary Effect of The Minnesota Statute is Neutral; it Does Not Advance Religion

The effects test, like the overall test of which it is a part, rests primarily on the requirement of governmental neutrality—the requirement that "no religion be ap-

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[14] If anything, Minn. Stat. § 290.09(22) evidences an intent to minimize whatever assistance, however indirect, the statute may provide to the religious function of private schools. The statute provides that parents may deduct the cost of textbooks used by their children only for subjects taught in public schools; the deduction "shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship" (*ibid.*). See *Wolman* v. *Walter*, *supra*, 433 U.S. at 236 n.5 (a statute's secular purpose is evidenced by provisions prohibiting use of services, materials, or equipment in religious courses or activities).

proved or favored, none commended, and none inhibited." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669. In determining the primary effect of a statute under the Establishment Clause, this Court has looked to a number of factors. The nature of the benefit, the character of the recipient, and the intimacy of the connection between the benefit and religious activity must all be taken into account. Also important is the breadth of the class benefited by the statute.

As the Eighth Circuit found in this case, the Minnesota statute in question is different from the New York statutory scheme in *Nyquist* in two significant respects. The Minnesota statute operates as a true deduction, unlike the tuition subsidy in *Nyquist*. Moreover, the statutory scheme here, unlike that in *Nyquist*, does not limit benefits to parents of private school children (Pet. App. A-41). Either of these distinctions should be sufficient to uphold the Minnesota statute.

1. *The Minnesota Tax Deduction Affords Only An Indirect And Insubstantial Benefit To Religion*

The benefit accruing to religious institutions from Minnesota's tax deduction is both indirect and insubstantial. It neither appropriates the income of taxpayers for religious functions, nor requires payments to religious institutions. Under these circumstances the law has no "direct and immediate effect of advancing religion," but "only a remote and incidental effect advantageous to religious institutions." *Nyquist*, *supra*, 413 U.S. at 784 n.39.

This Court has distinguished, for purposes of Establishment Clause analysis, between different forms of financial benefits to religious institutions. In *Walz* v. *Tax Commission*, *supra*, for example, the Court recognized that a tax exemption stood on a far different footing than a direct monetary subsidy from the state to churches. 397 U.S. at 675. "'[I]n the case of a direct

subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches'" (*id.* at 690-691) (Brennan, J., concurring). Tax exemptions, by contrast, involve no such diversion of resources; they "constitute mere passive state involvement with religion" (*ibid.*).[15]

The Court has also recognized that there is a distinction between providing benefits directly to religious institutions, and providing benefits to individuals, some of whom belong to such institutions. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 621; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 360-361 (opinion of Stewart, J.). Though not of decisive significance, see *Nyquist*, *supra*, 413 U.S. at 781, this factor must be considered for the obvious reason that the benefit may never be passed on to the religious institution or put to religious use. A tax deduction for parents whose child would attend a sectarian school in any event, for example, nei-

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[15] It appears from other contexts as well that this Court has not regarded tax exemptions (or deductions) and appropriations as fungible means of affording benefits to religious institutions. The impact of the former on federal taxpayers, for example, may be too insignificant to satisfy the constitutional requirements for standing. See *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968) (a federal taxpayer has standing to complain only of Congress's exercise of its "power under the *taxing and spending* clause of Art. I., § 8") (emphasis added); *ibid.* ("This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts"); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 n.17 (1982). Because the Establishment Clause rests in large part on a concern that citizens not be required to lend their support to religion, see *Everson* v. *Board of Education*, *supra*, 330 U.S. at 10-16, absence of the "injury in fact" required for constitutional standing would support the conclusion that the substantive requirements of the Clause are not violated when the government simply refrains from taxing.

ther encourages religious conduct nor increases the revenues of a religious institution.[16]

Moreover, far from encouraging religion the Minnesota deduction simply lessens the disparity between the burdens borne by two classes of state taxpayers. Like other states, Minnesota provides extensive support for a public school system which is properly, by constitutional guarantee, nonreligious. Viewed as one part of an overall effort to support education, the deduction promotes neutrality as between those who choose private and those who choose public education for their children.

Where grants have been provided directly to schools, this Court has been careful to require that no support go to their religious functions. But assistance in the form of transportation, books, and reimbursement for administration of tests may reduce costs, and thereby increase enrollment, without running afoul of the Establishment Clause. What is important is the intimacy of the nexus between state benefits and religious activity.

In the case of a tax deduction given to parents in general for education-related expenditures, the state's connection to religious activities at sectarian schools is too remote to violate the Establishment Clause. Unlike an

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[16] To say that such a deduction necessarily "rewards" religious conduct even though it does not affect the choice to engage in such conduct is to confuse the purpose and effect strands of the *Lemon* test. The Minnesota deduction does not necessarily reward religious conduct any more than a medical expense deduction rewards people for seeking medical services. The difference between the two kinds of deductions is that the former, unlike the latter, *would* be unconstitutional if the legislature's *motive* for enacting it were to favor religious taxpayers. As noted above, however, the Minnesota statute plainly has a secular purpose.

unrestricted grant to a sectarian school or to parents, here the taxpayer is simply relieved of the burden of paying some portion of taxes to the state. It is true that the tax deduction will offset to a degree money paid for tuition, and that tuition payments in turn may be viewed as funding in an undivided way both religious and secular functions of the school. But the same may be said of tax deductions for charitable contributions to churches (26 U.S.C. 170(a), (b)(1)(A)(i) and (ii)), since such contributions may be used to fund religious services, or the purchase of religious artifacts, or the publication of religious tracts.

Petitioners nevertheless contend (Pet. Br. 20-32) that Minnesota's deduction is unlike the exemption upheld in *Walz*, or the charitable deduction permitted by Section 170, and like the tax credit held invalid in *Nyquist*. Petitioners assert that the tax exemption in *Walz* was not a government subsidy to churches because the decision to exempt religious property was simply a byproduct of the "inevitable task of defining the tax base" (Pet. Br. 23 n.8). But by the same token, the exclusion of amounts paid for education can be seen as merely a byproduct of the inevitable task of defining taxable income. Minn. Stat. § 290.09(22) permits taxpayers to exclude a wide array of items—including business expenses, medical expenses, and alimony—in addition to educational expenses. The deduction of these items from taxable income is no more a subsidy to businesses, doctors, former spouses, or schools, than the exemption of property owned by religious organizations from the tax base in *Walz* was a subsidy to churches.

Nor is petitioners' purported distinction of Section 170 any more convincing. They argue that Section 170 allows a deduction for "voluntary contributions," made from "detached and disinterested generosity" (Pet. Br. 23), whereas § 290.09 involves "the deductibility of * * * user fees paid by a taxpayer in return for a

specified service" (Pet. Br. 13). The latter, they claim, is a "direct government subsidy" because the taxpayer—who receives both the service and a deduction—ends up in an "economically positive position in connection with the entire transaction." By contrast, the Section 170 taxpayer, who receives no quid pro quo, "remains in an economically negative position" even after the deduction (Pet. Br. 27 n.11). But the suggested distinction is irrelevant for Establishment Clause purposes. If the Clause forbids the government to encourage religious activity by the *taxpayer*, the encouragement offered by the government in the two cases is identical: assuming equal tax rates, the government foregoes collection of the same amount of money from one who pays $500 in tuition as it does from one who makes a $500 charitable contribution.[17] On the other hand, if the clause is concerned about the effect of government conduct on religious *institutions*, the deduction given in Section 170 may actually provide a more objectionable form of aid. If one focuses (as petitioners do) on the balance sheet, the institution receiving a charitable contribution ends up in an "economically positive position" because it need not provide services in exchange for the contribution.[18]

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[17] If the distinction offered by petitioners is meant to suggest that government encouragement will more likely be *effective* in the case of a "user fee" (because the taxpayer already has an economic incentive to engage in the favored transaction), it ignores the obvious fact that people act from noneconomic motives as well. Indeed, it is likely that those who seek religious education for their children are actuated by noneconomic motives in much the same way as are those who make charitable contributions to religious organizations.

[18] Petitioners also suggest that the Minnesota deduction, unlike a "genuine tax deduction" (Pet. Br. 30), is available only for a "narrowly defined activity" (*id.* at 23, 24, 25), and only to a narrow group of claimants (*id.* at 30). But a deduction for theft losses (see Pet. Br. App. A, Schedule A) is none the less "gen-

Finally, contrary to petitioners' contention, the Minnesota statute is different in significant ways from the New York law held invalid in *Nyquist*. One aspect of the scheme devised by New York was a provision for the direct appropriation to low income families of an amount of money unrelated to actual tuition expenses. Interlocked with that was a graduated system of tax relief

> unrelated to the amount of money actually expended by any parent on tuition * * *. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. * * * The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State.

413 U.S. at 790-791. Under these circumstances the Court concluded that—although the law might have secular purposes as well (*id.* at 773)—New York had acted from a desire to "reward [a parent] for sending his children to nonpublic schools" (*id.* at 791). The statute had both the "*purpose* and inevitable effect * * * to aid and advance those religious institutions" (*id.* at 793; emphasis added).[19]

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uine" for being available only in narrow circumstances. The relevant question for Establishment Clause purposes is not *how many kinds* of activities are deductible on a particular line of an income tax return, but whether the deductions allowed have a secular purpose and effect. It is true that the availability of any particular deduction to both religious and nonreligious taxpayers provides assurance that those requirements are satisfied, but as we argue below, pages 18-22, the Minnesota statute affords that assurance.

[19] See also 413 U.S. at 791 ("'the money involved represents a charge made upon the state for the *purpose* of religious educa-

This case, by contrast, presents the kind of tax deduction whose acceptability *Nyquist* declined to decide (413 U.S. at 790 n.49). Section 290.09 permits taxpayers to deduct from gross income the amount actually expended for tuition. The education deduction functions in precisely the same way as deductions for business expenses, medical expenses, political and charitable contributions, home mortgage interest payments, and so on. It does not afford a "predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage" (413 U.S. at 789). It simply represents a judgment by the state that income devoted to any educational expense—including tuition payments to public schools for special programs, to private secular schools, and to private sectarian schools—should not be subjected to the burden of taxation.[20]

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tion'") (emphasis added); *id.* at 793 (unlike New York's tuition tax relief, the aid in *Walz* was not a product "of any *purpose* to support or to subsidize") (emphasis added).

[20] Petitioners also rely (Pet. Br. 26) on several cases summarily affirmed by this Court for the proposition that deductions for "user fees" inevitably act as government subsidies for religious activities. In one of those cases, *Kosydar* v. *Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem., 413 U.S. 901 (1973), the state provided a dollar-for-dollar tax "credit" for nonpublic school parents and a narrow class of other claimants. 353 F. Supp. at 750, 760. If the total "credit" to which a parent was entitled exceeded his income tax liability, the statute provided a refund to the taxpayer, payable out of a special fund and capped by the sum of the sales, excise, and property taxes paid during the tax year (*id.* at 750). The law was thus identical in effect to the New York statute addressed in *Nyquist*—both involved a combination reimbursement/credit scheme designed to give "each family * * * a carefully estimated net benefit * * *." *Nyquist, supra*, 413 U.S. at 790.

In *Public Funds for Public Schools* v. *Byrne*, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979), the state provided a $1000 tax exemption only to parents of children in private school, and regardless of actual expenditures. 590 F.2d at 516.

2. *The Minnesota Statute Benefits A Broad Class*

"The provision of benefits to [a] broad * * * spectrum of groups is an important index of secular effect." *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981). This Court has held that among the kinds of benefits that may be allowed indirectly to accrue to sectarian schools are the provision of transportation to and from school, and the furnishing of textbooks, for all students. *Everson* v. *Board of Education*, *supra*; *Board of Education* v. *Allen*, *supra*. "In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." *Nyquist*, *supra*, 413 U.S. at 782 n.38 (emphasis in original). See also *Tilton* v. *Richardson*, *supra*; *Walz* v. *Tax Commission*, *supra*; *Nyquist*, *supra*, 413 U.S. at 782 n.38. In striking down tuition grants made available by New York only to children attending private schools, the Court in *Nyquist* left open the question "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" (*id.* at 783 n.38).[21]

Minn. Stat. § 290.09(22) is quite different from the state aid held invalid in *Nyquist*. Minnesota's tax provision allows a deduction for the educational expenses of

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Thus, not only was the tax relief available—unlike Minnesota's—only to a narrow class, but it could in theory result in a tax saving exceeding a taxpayer's expenditures for parochial school.

[21] In defining the breadth of the class benefited, the Court should also consider the larger context in which a particular form of public assistance plays a role. Federal tax relief for tuition payments, for example, would be merely one strand in a larger complex of programs designed to enhance the quality of public and nonpublic education alike.

all families with children in elementary and secondary school, whether public or nonpublic. While it is true that children attending public schools do not commonly pay tuition in the ordinary sense, they may do so if they attend school outside the district of their residence. More typically, public school students are faced with tuition charges for summer school, or tutoring services provided by the school, or such courses as driver education that may be included in the curriculum (Pet. App. A-62 to A-64). While the record does not reveal the number of taxpayers claiming such deductions, there is no reason to assume that it is small.[22] The statute is thus neutral in that it provides a deduction (up to the amount of the statutory ceiling) for all the expenses of educational instruction that parents may incur, whether their children attend public school, private secular school, or private sectarian school.

Petitioners nevertheless contend that the Minnesota statute is unconstitutional because "the overwhelming bulk of the benefits" accrues to parents with children in sectarian schools (Pet. Br. 37).[23] At the very least, they

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[22] We are informed by the State of Minnesota that deductions were claimed on behalf of 204,670 dependents on 1980 returns. (The number of nonpublic school students in 1979-1980 was 90,954. J.A. A33.) Nearly half of the deductions were in amounts of $200 or less. The state does not break deductions down among tuition, books, and transportation.

[23] The cases relied upon by petitioners in support of this proposition (Pet. Br. 40-41) are inapposite. Most of those cases involved benefits, usually in the form of direct cash grants, made available only to parents of children in nonpublic schools. *Public Funds for Public Schools* v. *Byrne*, *supra*, 590 F.2d at 516 ($1000 exemption for parents of nonpublic school children); *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 31 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974) (grants of $10-$20 to parents of nonpublic school children); *Sloan* v. *Lemon*, *supra*, 413 U.S. at 828-829 (grants of $75-$150 to parents of nonpublic school children); *Nyquist*, *supra*, 413 U.S. at 764-767

argue, the available statistics amount to a prima facie case that deductions are disproportionately available to such parents, and the State bears the burden of producing contrary evidence and persuading the court of its accuracy (*id.* at 36-50). It is erroneous, however, to suppose that an Establishment Clause violation can be deduced simply from the kind of statistical computations advanced by petitioners, even if they are accurate. More than half of the charitable deductions taken under Section 170 of the Internal Revenue Code of 1954 (26 U.S.C.) are for contributions to churches, Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harv. L. Rev. 309, 356 & n.79 (1972), yet this Court in *Nyquist* specifically left open the question whether that and similar deductions were consistent with the Establishment Clause "under the 'neutrality' test in *Walz*." *Nyquist*, *supra*, 413 U.S. at 790 n.49.

(grants of $50-$100 and parallel tax credits for parents of nonpublic school children). Cf. *Kosydar* v. *Wolman*, *supra*, 353 F. Supp. at 750, 760 (credit/reimbursement scheme for parents of nonpublic school children and a narrow class of public school parents); *United Americans for Public Schools* v. *Franchise Tax Board*, No. C-73-0090 (N.D. Cal.), aff'd mem., 419 U.S. 890 (1974) (credit of $125 for parents of nonpublic school children).

The remaining cases involved direct payments to nonpublic schools themselves for services or materials that, though available in public schools as well, would inevitably be intertwined with the religious mission of parochial schools. *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-480 (1973) (reimbursement of nonpublic schools for test administration, etc.); *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 607-610 (salary supplements for nonpublic school teachers, payments to schools for performance of secular services). Cf. *Wolman* v. *Walter*, *supra*, 433 U.S. at 250-255 (grant in kind of materials, provision of field trips, to children in nonpublic schools).

Neither the percentage[24] nor the dollar amount of benefits[25] should be a shibboleth for identifying Establishment Clause violations. As the court of appeals noted, it would be difficult to justify a rule that would hold "the same statute * * * constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools" (Pet. App. A-30 n.13). Rather, the "primary effect" test in *Lemon* was designed to accommodate all laws that achieve secular effects—even in a religious context—provided the attendant benefit to religion is incidental and indirect. See *Nyquist*, *supra*, 413 U.S. at 783-785 n.39. Regardless of the percentage distribution or dollar amount, the provision of benefits to a broad class affords significant assurance that any aid to religion is not only indirect (see pages 11-17, *supra*) but also an incidental byproduct of a secular legislative program. In the first place, the breadth of the class guarantees that the statutory effect is in fact secular, because it occurs outside as well as within a religious context. Here, as the court of appeals concluded (Pet. App. A-52),

> the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion * * *.

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[24] In *Nyquist* the Court refrained from "intimating whether this factor alone might have controlling significance * * *." 413 U.S. at 794.

[25] In *Wolman* v. *Walter*, *supra*, 433 U.S. at 233, the biennial appropriation for nonpublic school aid under a state statute sustained in large part by this Court was $88 million. Petitioners have estimated that the deductions taken under Minn. Stat. § 290.09(22) result in a revenue loss of approximately $2.4 million (Pet. App. A-18).

Moreover, inclusion of the religious within a broad class of statutory beneficiaries guarantees that they receive no advantage relative to secular recipients. Indeed, to exclude those acting on religious principles from enjoyment of benefits otherwise broadly available could violate the Free Exercise Clause.[26] That the average deduction claimed by parents of children attending sectarian schools may exceed the average deduction claimed by parents of public school children does not undermine this point. Taxpayers are treated neutrally by the statute in the sense that each may claim a deduction for all tuition expenses up to the ceiling of $500 or $700. The decision to spend more or less on education rests with the taxpayer, and the option of spending more is made no more attractive for the religious than it is for the nonreligious. It is true that religious parents may choose private school in disproportionate numbers; but the choice results from religious impulse, and not from any relative advantage afforded them by the law.[27]

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[26] *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Everson* v. *Board of Education*, *supra*, 330 U.S. at 16 ("New Jersey * * * cannot exclude * * * members of any * * * faith, *because of their faith*, * * * from receiving the benefits of public welfare legislation") (emphasis in original). But cf. *Sloan* v. *Lemon*, *supra*, 413 U.S. at 834 (equal protection).

[27] It is of course true that the choice to attend a sectarian school is made easier by the deduction, just as it is by state-supplied books or transportation. The point made in text is simply that a law does not confer a *relative* advantage on religion simply because religious parents claim its benefits in greater numbers. Such a law is thus consistent with "the 'neutrality' test in *Walz*." *Nyquist*, *supra*, 413 U.S. at 790 n.49.

C. The Minnesota Statute Does Not Foster Excessive Government Entanglement With Religion

In order for a statute to survive an Establishment Clause challenge, it must not involve "an excessive government entanglement with religion." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613. The tax deduction provided by Minnesota involves no such entanglement.[28]

Minn. Stat. § 290.09(22) creates no administrative relationship between government and religion. The statute provides that families with children attending nonprofit schools, which meet Minnesota's educational requirements and do not discriminate on the basis of race, may deduct their educational expenses. Thus, the only interaction between the State and schools themselves is what is necessary to determine compliance with educational, nonprofit, and nondiscrimination requirements[29]—a level of involvement long recognized

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[28] In *Nyquist*, the Court did not reach the question whether the tuition grant and tax relief provisions of New York's statute would result in an unacceptable entanglement of the state with religion. 413 U.S. at 794.

[29] Closer state scrutiny may be necessary to enforce the requirement that no deduction be taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship * * *." Minn. Stat. § 290.09(22). But the determination of such questions in the course of individual audits is not the kind of "comprehensive, discriminating, and continuing state surveillance" of religion that *Lemon* found objectionable. 403 U.S. at 619. And in any event, such a decision is not significantly different from the determination—required by the New York law upheld in *Walz* (397 U.S. at 667 n.1)—that property be "used exclusively for carrying out" exempt purposes.

as proper. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). So long as those demands are met, interaction between the State and the individual taxpayer in the course of an audit would be limited to verification of tuition expenses. That differs in no way from the government's involvement with religion occasioned by the review of charitable contributions under 26 U.S.C. 170. As the court of appeals correctly recognized, such "'church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional government and religion entanglements. *See Walz*, 397 U.S. at 674-76'" (Pet. App. A-35 to A-36).[30]

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[30] In addition to the three-part test developed in *Lemon* v. *Kurtzman*, *supra*, the Court has in some cases asked whether a statute challenged under the Establishment Clause has the potential to create political fragmentation along religious lines. It is doubtful whether that potential, though it may serve as a "warning signal," suffices to invalidate a statute otherwise constitutional. *Nyquist*, *supra*, 413 U.S. at 797-798. In any event, the concern has properly been limited to statutes of the type considered in *Lemon*, which require annual appropriations. *Committee For Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 661 n.8 (1980).

Minnesota's law, unlike the grants in *Lemon* and the credit (linked to grants) in *Nyquist*, provides a self-executing deduction program requiring no further action by the legislature. Cf. *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 698-699 (opinion of Harlan, J.) Moreover, the fact that Minnesota's statute extends benefits to all families with children in school, whether public or nonpublic, decreases any likelihood of conflict along religious lines. See *Nyquist*, *supra*, 413 U.S. at 794 ("in terms of the potential divisiveness * * * the narrowness of the benefited class would be an important factor").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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